Customs Bulletin

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and Decisions

of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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This issue contains:

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 90–97)

REVOCATION OF COMMERCIAL GAUGER APPROVAL AND COMMERCIAL LABORATORY ACCREDITATIONS OF WATSON GRAY (U.S.A.), INC. OF MARCUS HOOK, PA.

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of approval and accreditations of a commercial gauger and commercial laboratory.

SUMMARY: Pursuant to Section 151.13, Customs Regulations (19 CFR 151.13), the commercial gauger approval and commercial laboratory accreditations granted to Watson Gray (U.S.A.), Inc., of Marcus Hook, Pennsylvania have been revoked in full for failure to meet bonding requirements.

EFFECTIVE DATE: November 30, 1990.

FOR FURTHER INFORMATION CONTACT: Ira S. Reese, Special Assistant for Commercial and Tariff Affairs, Office of Laboratories and Scientific Services, U.S. Customs Service, Room 7113, 1301 Constitution Avenue NW, Washington, D.C. 20229 (202-566-2446).

Dated: December 11, 1990.

JOHN B. O'LOUGHLIN,
Director,
Office of Laboratories and Scientific Services.

[Published in the Federal Register, December 17, 1990 (55 FR 51783)]

19 CFR Part 133

(T.D. 90–98)

[RIN 1515-AA92]

GRAY MARKET GOODS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: A United States Supreme Court decision invalidated § 133.21(c) (3) of the Customs Regulations (19 CFR 133.21(c) (3)), which denies protection against imported gray market goods where the trademark or trade name on foreign-made merchandise was applied under authorization received from the U.S. owner, insofar as it interpreted 19 U.S.C. 1526(a). Because this regulatory provision interpreted and applied two statutory provisions, and to resolve any remaining ambiguity and maintain Customs longstanding practice of interpreting both underlying statutory provisions in tandem, Customs proposed revising its regulations to eliminate the provision in its entirety. Elimination of the provision will accord import protection to U.S. trademark and trade name owners from certain goods bearing recorded trademarks and trade names applied under authorization of the U.S. owner. Customs has determined to adopt the proposal as the final rule.

EFFECTIVE DATE: January 18, 1991.

FOR FURTHER INFORMATION CONTACT: Barry P. Miller, Intellectual Property Rights Task Force, U.S. Customs Service (202) 566-6956.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The U.S. Supreme Court issued a decision May 31, 1988, invalidating § 133.21(c)(3) of the Customs Regulations (19 C.F.R. 133.21(c)(3)), relating to the importation of gray market goods, insofar as it implements § 526 of the Tariff Act of 1930, as amended (19 U.S.C. 1526(a)). A gray market good bears a genuine trademark and is imported into the United States without the authorization of the owner of the U.S. trademark. The Court's decision, cited as *K Mart Corporation v. Cartier, et al., 47th Street Photo, Inc. v. Coalition to Preserve the Integrity of American Trademarks, et. al., United States et al., v. Coalition to Preserve the Integrity of American Trademarks, et al.*, 486 U.S. 281 (1988), is also referred to as the COPIAT decision.

Section 526(a) makes it unlawful (with certain exceptions) to import merchandise bearing a registered trademark "owned by a citizen of, or by a corporation or association created or organized within, the United States" if a copy of the trademark registration is filed with the Secretary

of the Treasury. The enforcement of this provision has been delegated to the U.S. Customs Service. The Customs Service, by regulation, implemented the statute under an interpretation that excepted from seizure articles bearing genuine trademarks applied abroad with the authorization of the owner of the U.S. trademark registration. This position was based on the Government's view of the statute's legislative history, Customs long-standing practice, and express Congressional recognition of that practice. Accordingly, § 133.21(c)(1) of the Customs Regulations denies protection against the importation of gray market goods where "[b]oth the foreign and the U.S. trademark or name are owned by the same person or business entity". Section 133.21(c)(2) similarly denies protection where "[t]he foreign and domestic trademark or trade name owners are parent and subsidiary companies or are otherwise subject to common ownership and control". Both §§ 133.21(c)(1) and 133.21(c)(2) were upheld by the supreme Court, and Customs will continue its administration of those sections as in the past.

Section 133.21(c)(3) of the Customs Regulations denies protection against imports where "the articles of foreign manufacture bear a recorded trademark or trade name applied under authorization of the U.S. owner". This section deals with authorized users or licensees. The Court's opinion concluded that § 133.21(c)(3) was not a permissible construction of 19 U.S.C. 1526(a). However, the Court did not rule on whether the regulation is consistent with 15 U.S.C. 1124 (§ 42 of the Lanham Act). Accordingly, although § 133.21(c)(3) was clearly invalidated as to 19 U.S.C. 1526(a), it was not so clear that the regulation is invalidated as to 15 U.S.C. 1124. To resolve any remaining ambiguity, and maintain its longstanding practice of interpreting both statutory provisions in tandem, Customs solicited comments on its position that § 133.21(c)(3) is invalid as to 15 U.S.C. 1124 as well, and on the proposal to eliminate § 133.21(c)(3) from the Customs Regulations. Import protection would thus be accorded to U.S. trademark and trade name owners from goods of foreign manufacture bearing recorded trademarks and trade names applied under authorization of the U.S. owner. In response to this request for comments on the proposal, Customs received more than 30 responses. Many of the comments received expressed similar viewpoints on the proposal.

ANALYSIS OF COMMENTS

Comment:

Several commentors voiced support for the Customs proposal without providing additional support for their position. Others, in expressing support, stated that because the Court ruled that § 133.21(c)(3) unlawfully exempted merchandise which violated 19 U.S.C. 1526 from seizure and forfeiture, the question of whether § 133.21(c)(3) was also violative of 15 U.S.C. 1124 was no longer relevant, and that the provision should be removed.

Response:

Customs agrees that § 133.21(c)(3) should be removed without regard to its validity under 15 U.S. 1124.

Comment:

Several comments, while supporting the Customs decision to eliminate § 133.21(c)(3), stated that the proposal did not go far enough. These commentors urged elimination of §§ 133.21(c)(1) and 133.21(c)(2) in addition to § 133.21(c)(3) as proposed.

Response:

Elimination of § 133.21(c)(1) and (2) is beyond the scope of this rulemaking.

Comment:

Some commentors opposed the proposed removal of paragraph (c)(3). They argue that removal of § 133.21(c)(3) is premature because Customs has made no attempt to identify how removal of the section will affect enforcement of §§ 133.21(c)(1) and (c)(2). The commentors also contend that Customs must ensure that the deletion of § 133.21(c)(3) will not be read as an invitation to evade §§ 133.21(c)(1) and (c)(2).

Response:

Removal of § 133.21(c)(3) does not require Customs to anticipate whether this change will be interpreted as an "invitation" to evade the separately valid and enforceable provisions of §§ 133.21(c)(1) and (c)(2).

Comment:

A commentor argues that any deletion of § 133.21(c)(3) should be based on § 526 of the Tariff Act only, and not 15 U.S.C. 1124. Only entities fully qualifying under § 526 of the Tariff Act should be eligible to restrict the entry of their genuine "authorized use" goods. The commentor recommends that Customs promulgate procedures to ensure that entities seeking to bar goods under § 133.21(c)(1) and (c)(2) are not under common ownership or control with the foreign manufacturer. The commentor further states that Customs should refrain from removing § 133.21(c)(3) until such procedures are in place.

Response:

Section 133.2 of the Customs Regulations already is specifically designed to elicit information about common ownership or control to determine whether gray market protection is available. Owners of trademarks currently recorded with Customs who have authorized independent parties to apply the mark to articles of foreign manufacture may now be eligible for protection against parallel imports ("gray market goods"). In keeping with past practice, Customs will accept notification of the circumstances believed to warrant amendment of a particular recordation. Eligible recordants should follow procedures outlined below.

Comment:

Customs proposed deletion of § 133.21(c)(3) would impermissibly broaden the Supreme Court's ruling in COPIAT.

Response:

It is because the Court did not reach the Lanham Act question in its decision and place any restrictions on Customs interpretation of § 42 of that Act that comments were solicited on this issue. In this rulemaking, Customs is exercising its authority to implement both the Tariff and Lanham Acts. The fact that the Court did not address the validity of § 133.21(c)(3) with regard to one of those acts, while holding it invalid with regard to the other, does not create a right to import goods which would be barred under the provision which was addressed.

DETERMINATION

After consideration of all the comments received in response to publication of the notice of proposed rulemaking, and after further review of the matter, it has been determined to adopt the regulations in final form as proposed.

AMENDMENT OF RECORDATIONS

Owners of trademarks currently recorded with Customs who have authorized independent parties to apply the mark to articles of foreign manufacture may now be eligible for protection against parallel imports ("gray market goods"). In keeping with past practice, Customs will accept notification of the circumstances believed to warrant amendment of a particular recordation. Notice should be in writing addressed to: U.S. Customs, Intellectual Property Rights Task Force (ORR), Room 2137, 1301 Constitution Avenue, N.W, Washington, D.C. 20229. Parties without independent foreign licensees need not take any action as a result of the deletion of section 133.21(c)(3) since the deletion will not affect the level of gray market protection afforded these parties.

REGULATORY FLEXIBILITY ACT

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the amendment will not have a significant economic impact on a substantial number of small entities. Accordingly, it is not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604.

EXECUTIVE ORDER 12291

This document does not meet the criteria for a "major rule" as specified in E.O. 12291. Accordingly, no regulatory impact analysis has been prepared.

DRAFTING INFORMATION

The principal author of this document was Peter T. Lynch, Regulations and Disclosure Law Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 133

Trademarks, Trade Names, Importations.

AMENDMENTS TO THE REGULATIONS

Part 133, Customs Regulations (19 CFR Part 133) is amended as set forth below:

PART 133 – TRADEMARKS, TRADE NAMES, AND COPYRIGHTS

1. The authority citation for Part 133 is revised to read as follows:

Authority: 17 U.S.C. 101, 601, 602, 603; 19 U.S.C. 66, 1624; 31 U.S.C. 9701.

2. Section 133.21(c) is amended by removing paragraph (c)(3) and marking it "Reserved."

CAROL HALLETT,
Commissioner of Customs.

Approved: November 9, 1990.

JOHN P. SIMPSON,
Assistant Secretary of the Treasury.

[Published in the Federal Register, December 19, 1990 (55 FR 52040)]

U.S. Customs Service

Proposed Rulemaking

19 CFR Part 4

NEGLIGENCE AS A CASUALTY WITHIN THE MEANING OF THE VESSEL REPAIR STATUTE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed interpretative rule.

SUMMARY: The current position of Customs regarding negligence as a basis for relief under the vessel repair statute is that absent any evidence of owner direction or inducement, negligence causing vessel damage is considered a casualty within the meaning of the statute (see C.S.D. 82–42). This interpretation, however, does not reflect the congressional intent of formulating a narrow provision which protects U.S. shipyards. Customs is proposing to revoke C.S.D. 82-42 and re-adopt the doctrine of foreseeability, albeit in a more limited scope, in assessing claims for relief from the duties assessed pursuant to the vessel repair statute. The negligence of regular crew members and other parties, for example stevedores, if proven by the vessel owner or his authorized agent, would still be considered a casualty within the meaning of § 1466(d)(1); however, no relief will be granted where the repairs resulted from conditions arising from: (1) violations of the U.S. Coast Guard or other applicable regulations; and/or (2) failure to correct, at the earliest opportunity, hazardous or potentially hazardous situations reported in any of the vessel logs, surveys, or transmittals to, from or between the vessel's operators, owners or other parties with direct knowledge of such situations. Because a change in the current interpretation of negligence in this area will have an effect on the domestic shipping industry, comments are invited with respect to this proposal.

DATES: Comments must be submitted on or before January 14, 1991.

ADDRESS: Written comments (preferably in triplicate) may be submitted to and inspected at the Regulations and Disclosure Law Branch, U.S. Customs Service Headquarters, Room 2119, 1301 Constitution Avenue, N.W., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Glen E. Vereb, Carrier Rulings Branch, (202) 566-5706.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Title 19, United States Code, section 1466, provides in pertinent part for payment of duty in the amount of 50 percent ad valorem on the cost of foreign repairs to vessels documented under the laws of the U.S. to engage in foreign or coastwise trade, or intended to engage in such trade. Section 1466(d)(1) provides for remission of the above duties in instances where good and sufficient evidence is furnished to show that foreign repairs were compelled by "stress of weather or other casualty" and necessary to secure the safety and seaworthiness of the vessel to enable her to reach port of destination.

Customs has modified its approach over the years with regard to the concept of negligence constituting an "other casualty" within the meaning of § 1466(d)(1). The doctrine of foreseeability was first enunciated in C.I.E. 488/47. The test at that time was whether or not the negligent act or acts (or the damages resulting therefrom) could have been foreseen and guarded against by the officers of the ship. This approach was found not to be conclusive in determining whether an occurrence which is not the consequence of extrinsic force is a casualty. C.I.E. 1161/62 (See also C.I.E. 688/72 and T.D. 55670(2).)

A line of cases subsequent to C.I.E. 1161/62 exists, however, holding that single negligent acts of officers of ships (as opposed to regular crew) preclude relief under the "other casualty" provisions of § 1466(d)(1) (C.S.D. 79-33, 81-154 and rulings cited therein). In C.S.D. 82-42 the distinction between officer and crew was eliminated. Negligent acts, whether committed by crew members or officers, were considered to be "other casualties" within the meaning of § 1466(d)(1) where owner direction or inducement is not in evidence.

The current position of Customs is that negligence committed by any party, absent owner direction or inducement, resulting in damage to the vessel constitutes a "casualty" within the meaning of § 1466(d)(1). This position, however, is in contravention of the interpretation of "casualty" by the Customs Court and ordinary English usage. Dictionaries uniformly define "casualty" as involving an accident and define "accident" as involving something unexpected or unforeseeable. Customs believes, for example, that if a vessel's chief engineer stores oily waste rags near a furnace, the resulting fire is foreseeable and therefore not a casualty.

In *Dollar Steamship Lines Inc. v. United States*, 5 Cust. Ct. 23, 28-29, C.D. 362 (1940), the court reasoned that:

> the word 'casualty' is to be considered together with the phrase 'stress of weather.' The phrase 'or other casualty' is supplemental to and qualifies the phrase 'stress of weather' broadening the term to include other similar casualties. * * * A casualty similar to 'stress of weather' would include such as is violently exerted; that which comes with unexpected force or violence, such as that of a fire, or a collision, or an explosion. We are of the opinion that a casualty simi-

> lar to 'stress of weather' should be of necessity a happening that comes with the violence of the turbulent forces of nature.

See also *International Navigation Co., Inc. v. United States*, 38 Cust. Ct. 5, 11, C.D. 1836; *Suwannee Steamship Co. v. United States*, 79 Cust. Ct. 19, 27, C.D. 4708.

Customs is of the opinion that the approach articulated in C.S.D. 82-42 is incorrect as a matter of law and that the doctrine of foreseeability should once again be implemented, albeit in a more limited scope, regarding claims for relief under the vessel repair statute based on the negligence of officers of a ship. The negligence of regular crew members and other parties, for example stevedores, if proven by the vessel owner or his authorized agent, would still be considered an unforeseeable casualty within the meaning of § 1466(d)(1); however, no relief will be granted where the repairs resulted from conditions arising from: (1) violations of U.S. Coast Guard or other applicable regulations; and/or (2) failure to correct, at the earliest opportunity, hazardous or potentially hazardous situations reported in any of the vessel's logs, surveys, or transmittals to, from or between the vessel's operators, owners, or the other parties with direct knowledge of such situations.

COMMENTS

Prior to making a determination on these matters and revoking C.S.D. 82-42, consideration will be given to written comments timely submitted to Customs. Submitted comments will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. § 552), § 1.4, Treasury Department Regulations (3 1 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m., at the Regulations and Disclosure Law Branch, Room 2119, U.S. Customs Service Headquarters, 1301 Constitution Avenue, N.W., Washington, D.C.

DRAFTING INFORMATION

The principal author of this document was Michael Smith, Regulations and Disclosure Law Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

CAROL HALLETT,
Commissioner of Customs.

Approved: December 10, 1990.
PETER K. NUNEZ,
Assistant Secretary of Treasury.

[Published in the Federal Register, December 14, 1990 (55 FR 51432)]

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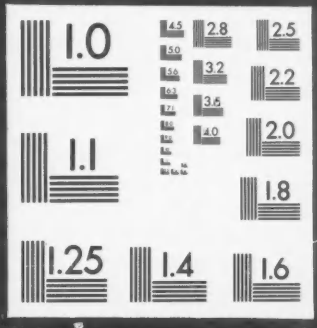
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